Supreme Court, U. S.
FILED
FEB 28 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1194

ANTHONY A. SPAGNOLO, JR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner prays for Writ of Certiorari to issue to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming judgment of conviction by the United States District Court for the Eastern District of Virginia.

OPINION BELOW

The United States Court of Appeals for the Fourth Circuit affirmed the judgment of conviction on December 10, 1976, and denied a petition for rehearing on January 27, 1977.

JURISDICTION

Jurisdiction is invoked umder Title 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Does the "Hobb" Act (18 U.S.C. 1951) have any application to a single isolated act not related to Racketeering and without any effect on Interstate Comerce?

STATUTE INVOLVED

Title 18, U.S.C. Section 1951, providing in relevant part:

> (a) Whoever in any way or degree obstructs, delays or affects commerce . . . by . . . extortion . . . shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

STATEMENT OF FACTS

The following is a brief review of relevant facts:

The petitioner and one Bridges were long time friends and business associates who had a falling out.

Mr. Spagnolo and Mr. Bridges decided to part company, and Mr. Bridges agreed to buy out Mr. Spagnolo's interest in a mutual business called A.B.S. Duplicators, Inc. for $24,000 payable $1,000 per month. Mr. Bridges also owed Mr. Spagnolo $500 as a result of a personal loan.

Mr. Bridges was also involved in a business venture, with a man named Dodson, called Dodson Construction Co.

Mr. Spagnolo went to the A.B.S. office to collect his August payment of $1,000. Mr. Bridges was away at the time, and Mr. Spagnolo prevailed on the general manager to pay him $1,500, by check. The government's

evidence indicated that the manager did not have authority to draw checks in this amount, and that the manager allegedly told Spagnolo that there was not enough money to cover the check The check bounced.

Bridges was apprised of this upon his return. He met with Spagnolo in Arlington, Virginia, at the site of a construction job they had a mutual interest in.

It was during this meeting that the alleged violations took place.

Here Mr. Spagnolo, while accompanied by 2 others, who were jointly charged and convicted, Anthony Falvo and Benjamin Fusco, obtained payment of the $1,500 and obtained the signature of Bridges to a document divesting himself of all interest in the Dodson Construction Co.

This was allegedly done by the use of threats and a show of force. The force was allegedly the display of a gun in the waistband of one of the defendants, and the pointing of a shotgun by Falvo.

Mr. Bridges testified he acted out of fear during this period. The use of any threats or show of force was disputed by defendants.

REASONS FOR GRANTING THE WRIT

1. Conflict between the Circuits as to the application of this statute, creating a need for clarification by the United States Supreme Court.

LEGAL POINTS AND AUTHORITIES

The Hobbs Act, 18 U.S.C. 1951, was aimed at labor racketeering, although it was not so limited, as racketeering in other areas is included as part of a legislative

plan to deter professional gangsterism. *Carbo* v. *U.S.*, 314 F.(2d) 718 (9th Cir. 1963).

Section 1951 makes illegal those extortions which in any way or degree obstruct, delay or affect commerce. In the case at bar, there was no evidence produced by the government that the Dodson Construction Co. had any effect on commerce. (See *Carbo* v. *U.S.*, id.; *U.S.* v. *Tropiano,* 418 F.(2d) 1069 [CCA 2-1969].)

Further, and more emphatically, it can hardly be said that this isolated incident involved even a hint of racketeering or professional gangsterism.

As the 9th Circuit held in *U.S.* v. *Calder,* 457 F.(2d) 74:

> This section was not intended to reach low level violence.

In the Calder case, the 9th Circuit, in reversing a Hobbs Act conviction, concluded that acts of that type (i.e., property damage caused to pressure a company into an agreement) are best left to the states, and doubted if Congress intended Section 1951 to apply. (See also *U.S.* v. *Bass*, 404 U.S. 336.)

In *U.S.* v. *Yokley*, decided by the Sixth Circuit Court of Appeals in September, 1976, that the Hobbs Act was not applicable to the robbery of a business engaged in interstate comerce It concluded that the activity was within the exclusive jurisdiction of Michigan.

Respectfully submitted,

ANTHONY A. SPAGNOLO, JR.
By Counsel

APPENDIX

APPENDIX

EXHIBIT A

Chapter 95—Racketeering

Sec.

1951. Interference with commerce by threats or violence.
1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.
1953. Interstate transportation of wagering paraphernalia.
1954. Offer, acceptance, or solicitation to influence operations of employee benefit plan.

HISTORICAL NOTE

1962 Amendment. Pub. L. 87-420, § 17(f), Mar. 20, 1962, 76 Stat. 43, added item 1954.

1961 Amendments. Pub. L. 87-228, § 1(b), Sept. 13, 1961, 75 Stat. 490, added item 1952.

Pub. L. 87-218, § 1, Sept. 13, 1961, 75 Stat. 492, added item 1953.

§ 1951. INTERFERENCE WITH COMMERCE BY THREATS OR VIOLENCE

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means

of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

June 25, 1948, c. 645, 62 Stat. 793.

EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-1163
UNITED STATES OF AMERICA, *Appellee,*
–versus–
ANTHONY A. SPAGNOLO, JR., *Appellant.*

No. 76-1164
UNITED STATES OF AMERICA, *Appellee,*
–versus–
ANTHONY J. FALVO, *Appellant.*

No. 76-1165
UNITED STATES OF AMERICA, *Appellee,*
–versus–
BENJAMIN A. FUSCO, *Appellant.*

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria.
Oren R. Lewis, District Judge.

Argued: July 13, 1976. Decided: December 10, 1976.

Before CRAVEN, RUSSELL and WIDENER, *Circuit Judges.*

Jack S. Rhoades (Howard, Stevens, Lynch, Cake and Howard on brief) for Appellant in 76-1165; William E. Jones, Jr. for Appellant in 76-1164; Louis Koutoulakos (George D. Varoutsos on brief) for Appellant in 76-1163; Justin W. Williams, Assistant United States Attorney (William B. Cummings, United States Attorney and Craig A. Starr, Special Attorney, Department of Justice on brief) for Appellee in 76-1163, 76-1164 and 76-1165.

PER CURIAM:

The defendants appeal their convictions under an indictment which charged in one count all three defendants with extortion in violation of § 1951, 18 U.S.C., and which in another count charged Spagnolo and Falvo with obstruction of justice in violation of § 1503, 18 U.S.C. We affirm.

The evidence of the Government established that the defendant Spagnolo, assisted by his co-defendants Falvo and Fusco, concocted a plan, whereby Falvo and Fusco, who, dressed in typical gangster attire,[1] posing as "Sicilians" imported by Spagnolo "for a job," and armed, one with a sawed-off shotgun and the other with a revolver, joined Spagnolo in forcing one Bridges, under threat that unless he complied they would put him "in a pine box," to execute for a consideration of $1 a written evidence of sale of his one-half interest in the construction firm of R. S. Dodson Construction Corporation to R. S. Dodson, and to give Spagnola $1,500, which the latter in turn passed on to his co-defendants Falvo and Fusco. Thereafter, Spagnolo gave Dodson a full account of the manner in which the three defendants had extorted the written evidence of sale and $1,500 from Bridges. Fusco and Falvo, also, made incriminating statements to Dodson. Dodson was summoned as a witness before the grand jury, inquiring into the charge of extortion. He promptly told Spagnolo and Falvo that he had been summoned. Spagnolo and Falvo told Dodson to testify before the grand jury that he knew nothing about any extortion by Spagnolo, Falvo and Fusco, and Dodson did testify as instructed by Spagnolo and Falvo including testimony that on the occasion when it was claimed that the three defendants intimidated Bridges, it was Bridges who was the belligerent one, brandishing a machine gun and popping pills. Later Dodson recanted this testimony, admitted it was false, and testified before the grand jury to the information given him by the three defendants about the manner in which the title transfer of Bridges' interest in the construction company and the delivery of the $1,500 was extorted. He explained his ac-

[1] Spagnolo, according to the Government's testimony, instructed Falvo, for instance, "to put on a dark suit, a dark shirt, a light tie, to wear a small ring that he knew he had in his possession and to look Mafia."

ceptance of the transfer of Bridges' interest in his firm by stating he feared to do otherwise because of Falvo and his reputation with a pick handle. Briefly summarized, that was the Government's case on extortion and obstruction of justice.

The defendants assert three grounds of error. First, they contend that there was insufficiency of evidence of interstate commerce connected with the charge of extortion to constitute an offense under § 1951. The statute, however, condemns any extortion which "in any way or degree obstructs, delays, or affects commerce." As its language indicates, the statute is not to be narrowly construed[2] nor is it "limited to conduct which directly and immediately obstructs a particular movement of goods in interstate commerce"[3] but covers any extortions which in any degree may reasonably be regarded as affecting commerce.[4] It is of no moment whether the defendants intended or contem-

[2] In *United States* v. *Addonizio* (3d Cir. 1971) 451 F. 2d 49, 76-7, *cert. denied* 405 U.S. 1048, the Court said:

> " ' * * * That Act (the Hobbs Act) speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence.' "

Cf., also, United States v. *LeFaivre* (4th Cir. 1974) 507 F. 2d 1288, 1296-7, *cert. denied* 420 U.S. 1004:

> " * * * We hold, therefore, that when the ordinary meaning of the Travel Act clearly covers an activity, we will not read into the Act any requirement that travel in interstate commerce or use of facilities in interstate commerce be a 'substantial' or an 'integral' part of the activity. Instead, we will apply the Act as it is written."

[3] *United States* v. *Pranno* (7th Cir. 1967) 385 F. 2d 387, 389, *cert. denied* 390 U.S. 944.

[4] *United States* v. *Amabile* (7th Cir. 1968) 395 F. 2d 47, 49, vacated and remanded on another ground, 394 U.S. 310.

plated an effect on commerce [5] nor is it necessary to offer evidence that particular shipments or transactions in commerce were affected; all that is required to bring an extortion within the statute is proof of a reasonably probable effect on commerce, however, minimal, as a result of the extortion.[6]

Measured by these standards, there was sufficient involvement of interstate commerce here to sustain a prosecution under § 1951. Bridges was the financial source of the construction enterprise, which received most, if not all its materials and equipment, in interstate commerce. The withdrawal of Bridges was reasonably calculated to reduce the ability of the construction company to purchase material in interstate commerce. This is enough under the statute.[7]

[5] In *United States* v. *Nakaladski* (5th Cir. 1973) 481 F. 2d 289, 289-9, cert. denied 414 U.S. 1064, the Court said:

> "* * * Under the Hobbs Act it is not necessary that the subject of the extortion constitute interstate commerce, or that the subject of the extortion constitute interstate commerce, or that the purpose of the extortion be to affect interstate commerce. All that is required is that trade be affected by extortion 'in any way or degree,' (citing cases) and that the victim have been induced to part with property through the use of fear."

[6] *United States* v. *Staszcuk* (7th Cir. *en banc* 1975) 517 F. 2d 53. The Court said at pp. 59-60:

> "* * * We hold, however, that the commerce element of a Hobbs Act violation—the federal jurisdiction fact—may be satisfied even if the record demonstrates that the extortion had no actual effect on commerce. Congressional concern is justified by the harmful consequences of the class of transactions to which the individual extortion belongs, and jurisdiction in the particular case is satisfied by showing a realistic probability that an extortionate transaction will have some effect on interstate commerce."

In *United States* v. *Provenzano* (3d Cir. 1964) 334 F. 2d 678, 692, *cert. denied* 379 U.S. 947, the Court said:

> "* * * The specific amount of such money obtained by extortion or the precise manner or degree to which it had an effect on the business is of no consequence."

The second claim of error pressed by the defendants is the failure of the trial court to provide an answer to a question submitted by the jury. This issue arose sometime in the late afternoon after the jury had retired and begun its deliberations. The jury requested an answer from the Court to the inquiry, "(d)oes threat of bodily harm by force constitute guilt on Count II?" In the meantime, however, the trial judge had left the courthouse and the jury was under the supervision of Judge Bryan. Judge Bryan told the jury that Judge Lewis, who presided at the trial and was familiar with the case, would answer their question in the morning. The jury resumed deliberations the next morning but before Judge Lewis arrived at court, they had reached a verdict. The choice was the jury's whether they should await an answer from the court or whether they could resolve the guilt or innocence of the defendants without an answer to their inquiry. The original charge of the court fully covered the matter embraced within the question and it is readily understandable that the jury could proceed without seeking further elucidation from the court. The jury apparently unanimously resolved not to await any restatement of the instructions. It must be assumed that they had determined that they did not need an answer to their inquiry in order to reach a verdict. Under the circumstances the defendants have no cause to complain.[8]

[7] *See, United States* v. *Staszcuk, supra,* 517 F. 2d at 59-60; *Carbo* v. *United States* (9th Cir. 1963) 314 F. 2d 717, 732, *cert. denied* 365 U.S. 861; *United States* v. *DeMet* (7th Cir. 1973) 486 F. 2d 816, 821-2, *cert. denied* 416 U.S. 969.

[8] *Jordan* v. *Bondy* (D.C.Cir. 1940) 114 F. 2d 599, 605; *United States* v. *Lanni* (E.D.Pa. 1971) 335 F. Supp. 1060, 1084, *aff'd.* 466 F.2d 1102.

In *Lanni,* the Court said:

> "In this case, we do not know how many jurors sought the additional instruction, but it is clear that the jury continued

Lastly, the defendants assert that, because the trial judge referred at one point to Dodson as "an accomplice," he implied there had been a crime, which was the issue to be resolved by the jury. A reading of the entire charge clearly shows that whether a crime had been committed was left entirely for the jury under the evidence and we cannot conceive that the mere use of the term "accomplice" at a single point in the instructions could have possibly given the jury any other impression.

The judgments of conviction are

Affirmed.

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deliberating while the Court was in chambers conferring with counsel and a short time later the jury reached a verdict. In this case, as in *Jordan*, each juror was polled and assented to the guilty verdict. Therefore, we can only conclude that the juror or jurors who sought additional instructions changed their mind about the need for instructions and were able to reach a guilty verdict through further deliberations." pp. 1084-85.

Supreme Court, U. S.
FILED
JUN 20 1977
MICHAEL RODAK, JR., CLERK

NOS. 76-6221 AND 76-1194

In the Supreme Court of the United States

OCTOBER TERM, 1976

BENJAMIN A. FUSCO, PETITIONER

v.

UNITED STATES OF AMERICA

ANTHONY A. SPAGNOLO, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-6221

BENJAMIN A. FUSCO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 76-1194

ANTHONY A. SPAGNOLO, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-8a)[1] is reported at 546 F. 2d 1117.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1976. A petition for rehearing was denied on January 27, 1977. The petition for a writ

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[1]"Pet. App." designates the Appendix to the petition in No. 76-1194 (Spagnolo).

of certiorari in No. 76-6221 was filed on February 24, 1977. The petition for a writ of certiorari in No. 76-1194 was not filed until February 28, 1977, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether extortion to force the sale of an interest in a company receiving materials traveling in interstate commerce affected commerce within the meaning of the Hobbs Act, 18 U.S.C. 1951.

2. Whether the trial court's instructions to the jury concerning accomplice testimony interfered with the jury's fact-finding function.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioners were convicted of one count of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951. Petitioner Spagnolo was also convicted of one count of obstruction of justice, in violation of 18 U.S.C. 1503. On the extortion count, petitioner Fusco was sentenced to one year's imprisonment and petitioner Spagnolo to three years' imprisonment. On the obstruction count, Spagnolo was sentenced to three years' imprisonment, one year to be served concurrently with his other sentence, one year consecutive to that sentence, and one year suspended. The court of appeals affirmed (Pet. App. 3a-8a).[2]

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[2]Co-defendant Anthony Falvo was also convicted of violating 18 U.S.C. 1951 and 18 U.S.C. 1503. He was sentenced to concurrent two-year terms of imprisonment. The court of appeals affirmed, and Falvo has petitioned for a writ of certiorari (No. 76-6723, filed May 13, 1977).

Ron Bridges and Robert Dodson were partners in a construction company located in Northern Virginia (Tr. 129-130). The company received supplies, machinery, and equipment that was produced outside the State of Virginia and that traveled in interstate commerce (Tr. 131, 222-223, 437-438, 444-445, 464-466, 699, 701-704, Gov't. Exs. 4-6). Bridges supplied money for investment and was a personal guarantor on $5,000 worth of equipment (Tr. 129-130). Dodson did not have sufficient personal credit in the Northern Virginia area and needed the backing of a photocopy firm, ABS Duplicators, Inc., and of Bridges as a co-signer, in order to obtain credit from suppliers and merchants (Tr. 593-594).

Petitioner Spagnolo had previously been a co-owner with Bridges of ABS Duplicators (Tr. 120-122). In February 1973, Bridges agreed to buy out Spagnolo's interest for $24,000, to be paid in monthly installments of $1,000 (Tr. 122-124, 126). In August 1974, Spagnolo visited ABS Duplicators while Bridges was away and accepted a check for $1,500 from an employee, to cover both the August payment pursuant to the earlier agreement, and a personal loan. He was warned to hold the check because it was drawn on an account that lacked sufficient funds to cover the sum, but he deposited it for collection anyway. It bounced (Tr. 913-915).

On September 3, 1974, Bridges and a friend, Monte Jones, visited Spagnolo at a construction site where the latter was erecting an apartment house (Tr. 144-145). While Bridges and Spagnolo were talking, two men drove up, "dressed like they just stepped off a James Cagney movie set" (Tr. 149), wearing dark suits, black shirts, and white ties; they were introduced by Spagnolo simply as "a couple of Sicilian friends of his" (Tr. 150). Bridges identified them as petitioner Fusco and co-defendant Falvo (Tr. 183-184). Spagnolo, Bridges, and the other

two men proceeded to a basement apartment in the building (Tr. 153), where Spagnolo handed Bridges a sales agreement for his stock rights and interest in the R.S. Dodson Construction Company, for consideration of $1 (Tr. 159). According to Bridges, Spagnolo told him if he did not sign the agreement they would put him "in a pine box" (Tr. 170-171). Falvo took a sawed-off shotgun out of a gun case and pointed it at Bridges; Fusco drew back his jacket to reveal a revolver (Tr. 173-175). After these and additional threats by Spagnolo Bridges signed the agreement (Tr. 181); he also wrote another $1,500 check made out to Spagnolo (Tr. 182-190).

Monte Jones corroborated Bridges' testimony concerning persons present, the threats made, and the presence of the red gun case (Tr. 334-343). A student working for Spagnolo at the construction site also identified Fusco and Falvo (Tr. 500), testified to seeing a black gun case (Tr. 504, 506-507, and said that Spagnolo indicated to him that "he did a favor for Mr. Dodson" and that they scared Bridges (Tr. 510-511). A former employee of both Bridges and Spagnolo testified that Spagnolo told her how he had scared Bridges, that Bridges sold the company to him for $1, and that there was a shotgun involved (Tr. 388-389, 393-394).

Dodson testified that Spagnolo encouraged him to consider purchasing Bridges' share of the construction company (Tr. 521-522, 531-532) and that Spagnolo helped Dodson prepare the sales agreement and Bridges' resignation from the corporation (Tr. 541, 543). Dodson further stated that Spagnolo, in Dodson's presence, instructed Falvo on the methods to be used to force Bridges to sign the agreement (Tr. 546-549, 551), including the statement that if Bridges proved recalcitrant, Falvo should hang him out of his fourth floor office window by his feet (Tr. 552), and that Spagnolo's act in buying Bridges out, and the use of threats of violence, were done with Dodson's knowledge and consent (Tr. 632-635).

Spagnolo, Fusco, and Falvo, testifying on their own behalf, denied that pressures or threats were directed against Bridges.

ARGUMENT

1. The court of appeals correctly held that the evidence was sufficient to make out a Hobbs Act violation. There is no claim in this case that "extortion" was not practiced on Bridges; the only claim is that the extortion did not affect interstate commerce within the meaning of that Act. The evidence shows, however, that Bridges supplied the greater portion of financial backing for the construction firm involved in the extortion. That firm received supplies and materials in interstate commerce, and the effect of the withdrawal of Bridges' financial support and credit standing was sufficient to constitute the minimal effect on commerce necessary to meet the statute's commerce requirement. See *Stirone* v. *United States*, 361 U.S. 212, 215. *United States* v. *Hathaway*, 534 F. 2d 386, 396 (C.A. 1); *United States* v. *Amato*, 495 F. 2d 545 (C.A. 5); *United States* v. *Gill*, 490 F. 2d 233 (C.A. 7), certiorari denied, 417 U.S. 968; *United States* v. *Tropiano*, 418 F. 2d 1069 (C.A. 2), certiorari denied, 397 U.S. 1021; *Carbo* v. *United States*, 314 F. 2d 718, 732 (C.A. 9).[4]

Petitioner Spagnolo's contention (Pet. No. 76-1194, pp. 3-4) that the Hobbs Act is directed only at "labor racketeering" or "professional gangsterism" rather than "isolated incidents" was not clearly raised below, and the court

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[4]Some courts have found the jurisdictional element to be met by the fact that a "realistic probability" existed that the transaction would affect commerce. *United States* v. *Staszcuk*, 517 F. 2d 53, 60 (C.A. 7) (*en banc*), certiorari denied, 423 U.S. 837. *United States* v. *Pranno*, 385 F. 2d 387 (C.A. 7), certiorari denied, 390 U.S. 944; *Hulahan* v. *United States*, 214 F. 2d 441, 445 (C.A. 8), certiorari denied, 348 U.S. 856.

of appeals therefore did not discuss it. In any event, the absence of any definition of "racketeering" in the Hobbs Act, and that statute's unqualified condemnation of extortion affecting interstate commerce, demonstrate that the extortion practiced by petitioners in this case is within the statute. The act is not confined to labor racketeering: "its prohibitions were applicable to all groups" (*United States* v. *Yokley*, 542 F. 2d 300, 303 (C.A. 6)), and it applies to single incidents of extortion affecting commerce whether or not they are part of repetitive patterns. See, *e.g.*, *United States* v. *Staszcuk*, 517 F. 2d 53 (C.A. 7); *United States* v. *Pranno*, 385 F. 2d 387 (C.A. 7), certiorari denied, 390 U.S. 944. Although the Sixth Circuit in *Yokley*, *supra*, and the Ninth Circuit in *United States* v. *Culbert*, 548 F. 2d 1355, 1357, have recently held, contrary to the decisions of other circuits, that the Act is limited to "racketeering"— a term they do not, and we cannot, precisely define—we submit that this important issue should be resolved on a record on which it was clearly raised and decided.

2. Petitioner Fusco contends that the court's accomplice instruction interfered with the jury's function. The court instructed the jury that "Dodson was an aider and abettor, an accomplice, an unindicted accomplice, as far as the Court is concerned, * * * "(Tr. of Jury Charge, p. 31). But this statement was simply describing Dodson's own testimony as a foundation of the court's warning that accomplice testimony should be received with caution (*id.* at 41). There is no material risk that the jury would have understood the court to be telling it that a crime had been committed or to be directing it to return a guilty verdict (Tr. of Jury Charge, p. 31). Moreover, the court specifically instructed the jury on at least seven separate occasions (Tr. of Jury Charge pp. 4-5, 6, 7, 8, 33, 42, 43), that the jury alone was the trier of fact and that the court's instructions were not evidence. Thus, as in *United States* v. *Thompson*, 476 F. 2d 1196, 1200 (C.A.

7), certiorari denied, 414 U.S. 918: "The jury [could not] have failed to discern that the purpose of the instruction was to alert it to the need for caution in weighing the testimony, all to the benefit of the defendant."

Petitioner Fusco's (Pet. No. 76-6221, pp. 10-12) reliance upon *Henderson* v. *United States*, 202 F. 2d 400 (C.A. 6), and upon *United States* v. *Balodimas*, 177 F. 2d 485 (C.A. 7), is misplaced. In *Henderson*, which was reversed for a cumulation of several prejudicial errors, the instruction expressly charged that co-defendants, who had pending pleas of not guilty, were accomplices as a matter of law. In *Balodimas*, the charge included, with respect to two witnesses, the unsupported statement that they "have openly admitted that they are law violators and have openly admitted the part that they had in the commission of the crime" (177 F. 2d at 487), when in fact neither admitted knowledge of or acquiescence in the illegal scheme.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1977.

DOJ-1977-06